

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

**IPFS CORPORATION, a Missouri  
Corporation,**

Case No.: 2:14-cv-00509-GMN-NJK

VS.

vs. ) ORDER

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LORRAINE CARRILLO, an individual,

Defendant.

## ORDER

Pending before the Court is the Motion for Partial Summary Judgment (ECF No. 44) by Plaintiff IPFS Corporation (“Plaintiff” or “IPFS”), and the Motion for Summary Judgment (ECF No. 60) filed by Defendant Lorraine Carrillo (“Defendant”). Both motions have been fully briefed.

## I. BACKGROUND

Defendant is a former employee of Plaintiff, a premium financing company. (Compl. ¶ 6, ECF No. 1). In 1993, she entered into a non-compete agreement (the “Agreement”) with Plaintiff, which prohibited her from doing business with Plaintiff’s customers, both during her employment and for eighteen months thereafter. (*Id.* ¶¶ 7, 9). Defendant resigned her Sales Executive position in January 23, 2014, after more than twenty-one years with Plaintiff. (*Id.* ¶¶ 6, 10). She is currently an employee of Premium Assignment Corporation (“PAC”), one of Plaintiff’s competitors. (*Id.* ¶ 2).

Plaintiff alleges that, shortly after Defendant's resignation, Defendant began soliciting at least three of Plaintiff's current Nevada-based clients, both of whom she had serviced while in

1 Plaintiff's employ. (*Id.* ¶¶ 11–13). Defendant allegedly continued doing business with these  
2 clients, despite written correspondence from Plaintiff ordering her to cease and desist, as well  
3  
4 as assurances from PAC to the contrary. (*Id.* ¶¶ 14–15).

5 Plaintiff's Complaint alleges breach of contract and states that Plaintiff will incur  
6 "irreparable harm in the form of lost customer goodwill and lost business" if Defendant is  
7 allowed to continue her competitive activities. (*Id.* ¶¶ 17–24). Plaintiff accordingly filed an  
8 Emergency Motion for Temporary Restraining Order. (ECF No. 2). The Court denied this  
9 motion because Plaintiff failed to show that the temporary restraining order should have been  
10 granted without notice to Defendant; specifically, Plaintiff failed to mention the requirements  
11 of Federal Rule of Civil Procedure 65(b). (Order Denying Pl.'s Mot. for TRO, ECF No. 7).  
12 Plaintiff subsequently filed a Motion for Preliminary Injunction (ECF No. 10), which the Court  
13 denied (ECF No. 37).

14 **II. LEGAL STANDARD**

15 The Federal Rules of Civil Procedure provide for summary adjudication when the  
16 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
17 affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant  
18 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that  
19 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
20 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable  
21 jury to return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if  
22 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
23 in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th  
24 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
25 principal purpose of summary judgment is "to isolate and dispose of factually unsupported

1 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

2 In determining summary judgment, a court applies a burden-shifting analysis. “When  
3 the party moving for summary judgment would bear the burden of proof at trial, it must come  
4 forward with evidence which would entitle it to a directed verdict if the evidence went  
5 uncontested at trial. In such a case, the moving party has the initial burden of establishing  
6 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*  
7 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In  
8 contrast, when the nonmoving party bears the burden of proving the claim or defense, the  
9 moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
10 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
11 party failed to make a showing sufficient to establish an element essential to that party’s case  
12 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–  
13 24. If the moving party fails to meet its initial burden, summary judgment must be denied and  
14 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,  
15 398 U.S. 144, 159–60 (1970).

16 If the moving party satisfies its initial burden, the burden then shifts to the opposing  
17 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*  
18 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
19 the opposing party need not establish a material issue of fact conclusively in its favor. It is  
20 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the  
21 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
22 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid  
23 summary judgment by relying solely on conclusory allegations that are unsupported by factual  
24 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go  
25 beyond the assertions and allegations of the pleadings and set forth specific facts by producing

1 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

2 At summary judgment, a court's function is not to weigh the evidence and determine the  
 3 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.  
 4 The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn  
 5 in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is  
 6 not significantly probative, summary judgment may be granted. *See id.* at 249–50.

7 **III. DISCUSSION**

8 In its Motion for Partial Summary Judgment, Plaintiff seeks summary judgment as to  
 9 "[Defendant]"s liability and to enjoin [Defendant] from further violation of her contractual  
 10 duties." (Pl.'s Mot. for Par. Summ. J. 4:28–5:2, ECF No. 44). Conversely, in her Motion for  
 11 Summary Judgment, Defendant contends that summary judgment should be granted in her  
 12 favor and against Plaintiff on each of its claim on the following bases: (1) "IPFS cannot  
 13 demonstrate it has a protectable interest in any of the accounts on the Restricted List," (2)  
 14 "[e]ven if IPFS had a legally protectable interest in some unspecified accounts on the Restricted  
 15 List, there is no evidence on which the Court can modify the Agreement so that it is 'no more  
 16 restrictive than necessary to protect the legitimate interests' of IPFS as required under Missouri  
 17 law;" and (3) "[a]s a matter of law and policy, the Court should decline to modify the  
 18 Agreement." (Def.'s Mot. for Summ. J. 2:7–16, ECF No. 60).

19 **A. Modification of the Agreement**

20 In Missouri, "[b]ecause non-compete agreements are considered to be in restraint of  
 21 trade, they are presumptively void and enforceable only to the extent that they are demonstrably  
 22 reasonable." *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980).  
 23 That is, they must be "no more restrictive than is necessary to protect the legitimate interests of  
 24 the employer" and "narrowly tailored geographically and temporally." *Healthcare Servs. of the  
 25 Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 610 (Mo. 2006).

1       The reasonableness of the non-compete agreement's geographical limits "depends upon  
2 whether the employer possessed a stock of customers located co-extensively with those  
3 geographical limits." *Orchard*, 601 S.W.2d at 303 (reducing agreement's geographical limit  
4 from 200 to 125 miles, as employer had customers only within the smaller radius); *see also*  
5 *Cont'l Research Corp. v. Scholz*, 595 S.W.2d 396, 400 (Mo. Ct. App. 1980) (employer had no  
6 protectable interests in customer contacts outside employee's assigned territory). Missouri  
7 courts have enforced customer non-solicitation clauses lacking geographical limits only "when  
8 other limitations to the prohibited conduct exist or when the employee had significant contact  
9 with a substantial number of the employer's customers." *Whelan Sec. Co. v. Kennebrew*, 379  
10 S.W.3d 835, 842 (Mo. 2012). Similarly, in *Systematic Business Services, Inc. v. Bratten*, the  
11 Missouri Court of Appeals enforced a national company's non-solicitation clause prohibiting an  
12 employee from contacting all of its customers, because the employee had "substantial and  
13 continuing contact" with customers throughout the nation. 162 S.W.3d 41, 51 (Mo. Ct. App.  
14 2005); *see also Nat'l Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 104–05 (Mo. Ct. App.  
15 1978) (enforcing a customer non-solicitation clause limited to customers with whom employee  
16 and salesmen under his supervision dealt).

17       Under Missouri law, the Agreement here is too broad to enforce as written because it  
18 goes beyond simply protecting Plaintiff's customer contacts and instead places unreasonable  
19 limitations on Defendant's ability to work in her field. The Agreement states that Defendant  
20 may not

21       directly or indirectly, in any manner or capacity, engage in or have  
22 a financial interest in any business carried on by the Employer  
23 during the period of Employee's employment, if such business at  
24 any time contacts or solicits or attempts to contact or solicit any  
Customer or Potential Customer with whom Employer is doing  
business at the time of termination of Employee's employment.

25 (Compl. Ex. A, at 2). The Agreement defines "Potential Customer" as "a Customer which the

1 Employer actively solicits through personal contact or direct correspondence prior to or during  
2 Employee's association with the Employer." (*Id.*). Because of this expansive definition and the  
3 absence of geographical limitations, the Agreement effectively prevents Defendant from  
4 working for any premium financing company anywhere in the world to whom Plaintiff has sent  
5 as much as a letter.

6 Recognizing the overbroad nature of the Agreement, Plaintiff requests to limit the  
7 application of the Agreement only to a "Restricted List" of 103 of Plaintiff's current customers  
8 that Defendant serviced during the last 24 months of her employment. (Pl.'s Mot. for Par.  
9 Summ. J. 9:3–10). The Missouri Court of Appeals "recognize[s] that an unreasonable  
10 restriction against competition in a contract may be modified and enforced to the extent that it  
11 is reasonable, regardless of the covenant's form of wording." *Mid-States Paint & Chem. Co. v.*  
12 *Herr*, 746 S.W.2d 613, 616 (Mo. Ct. App. 1988); *see also Whelan*, 379 S.W.3d at 847  
13 (modifying overbroad customer/potential customer non-solicitation clauses to make non-  
14 compete agreement enforceable).

15 Missouri courts have recognized that "[a]n employer has a legitimate interest in  
16 customer contacts to the extent it seeks to protect against 'the influence an employee acquires  
17 over his employer's customers through personal contact.'" *Whelan*, 379 S.W.3d at 842 (quoting  
18 *Copeland*, 198 S.W.3d at 610). In determining the reasonableness of a restriction regarding  
19 customer contacts, "the quality, frequency, and duration of employee's exposure to the  
20 customers is of crucial importance." *Cont'l Research*, 595 S.W.2d at 401.

21 Here, Plaintiff seeks a modification of the Agreement, which would prevent Defendant  
22 from soliciting the same customers Plaintiff paid Defendant to solicit during the last 24 months  
23 of her employment. (Pl.'s Mot. for Par. Summ. J. 9:4–7). On the other hand, Defendant asserts  
24 that "IPFS coded all of its clients in Las Vegas to [Defendant]," and "IPFS created the  
25 Restricted List by printing every agency which was 'coded' (i.e., all of IPFS's clients in

1 Southern Nevada) which had obtained premium financing from IPFS during the final two years  
 2 of [Defendant]'s employment." (Def.'s Mot. for Summ. J. 4:26–5:4). Defendant maintains that  
 3 Plaintiff "made no assessment of the 'quality, frequency or duration' of [Defendant]'s contacts  
 4 with the customers on the list." (*Id.* 8:26–9:1 (quoting *Cont'l Research*, 595 S.W.2d at 400)).  
 5 However, when asked at her deposition whether there were any agencies on the Restricted List  
 6 that she did not have contact with while employed at IPFS, Defendant identified only 5  
 7 customers out of the 103 customers on the Restricted List. (Dep. Tr. of Lorraine Carrillo 90:12–  
 8 93:16, ECF No. 57-2 (listing JPG Insurance, Century One, O'Keefe Insurance, Bodenstein  
 9 Insurance, and Bill Mitchell Insurance)). Moreover, Plaintiff maintains that, "[a]lthough  
 10 [Defendant] was paid to service these customers and received compensation for their sales,  
 11 IPFS does not oppose striking these 5 customers from the Restricted List." (Pl.'s Reply 9:19–  
 12 23, ECF No. 57).

13 Defendant also asserts that "IPFS arbitrarily selected a 24-month 'look-back' period in  
 14 compiling the Restricted List, and there is no evidence on which the Court could find that  
 15 period, or a lesser one, is appropriate." (Def.'s Mot. for Summ. J. 10:26–28). However,  
 16 Plaintiff maintains that "IPFS considers the customers identified on the Restricted List active  
 17 because many agents will encounter the opportunity to facilitate premium financing only  
 18 occasionally, meaning, these customers may need IPFS 's services once every two or three  
 19 years." (Dec. of Michael Gallagher ¶ 34, ECF No. 44-6). Moreover, in her deposition, Rachel  
 20 Yunk, Vice President NW Regional Manager for IPFS, testified that IPFS uses the last 24  
 21 months to identify a sales executive's current book of business:

22 Q. Did you consider including a restricted list that contained only  
 23 those customers to whom Carrillo sold during the last six months of  
 24 her employment or 12 months or some other shorter time period  
 other than 24?

25 A. No.

Q. Why not?

1 A. Because we look at somebody who had given us at least one  
2 piece of business in the last 24 months as an active agent. So they  
3 would be part of her book that she should be servicing.

4 Q. Okay. And when you say we look at that as an active agent, is  
5 that -- why is it that period, why is it not shorter or longer?

6 A. Because many agencies only write a few accounts a year, and -- I  
7 mean, it's just the business is very different with regards to some  
8 agencies when they process business, so they're just considered an  
9 active agent for that time period.

10 (Dep. Tr. of Rachel Yunk 68:14–69:7, ECF No. 57-1).

11 Based on the foregoing, the Court finds that modifying the Agreement to prevent  
12 Defendant from soliciting or accepting sales from the 98 customers she had contact with during  
13 the last 24 months of her employment with IPFS is demonstrably reasonable, as it is no more  
14 restrictive than is necessary to protect the legitimate interests of Plaintiff.

15 Moreover, the Court finds that an 18-month restriction period, starting from the date of  
16 Defendant's termination with IPFS, is reasonable. Plaintiff explains that the business reason  
17 behind the 18-month period “is that it would give [IPFS] enough time to solidify those  
18 relationships with replacement people.” (Dep. Tr. of Michael Gallagher 126:9–11, ECF No. 55-  
19 2). Moreover, Missouri courts have upheld the same or longer restrictions. *See USA Chem, Inc.*  
20 *v. Lewis*, 557 S.W.2d 15, 24 (Mo. Ct. App. 1977) (upholding 18-month restriction as  
reasonable to protect employer's legitimate interests); *Prop. Tax Representatives, Inc. v.*  
*Chatam*, 891 S.W.2d 153, 158 (Mo. Ct. App. 1995) (upholding two-year non-solicitation  
restriction). Accordingly, Defendant's Motion for Summary Judgment is denied.

21 **B. Defendant's Liability Under the Modified Agreement**

22 Plaintiff asserts that Defendant's discovery responses and deposition testimony provide  
23 undisputed evidence of Defendant's breaching conduct. (Pl.'s Mot. for Summ. J. 9:26–10:5).  
24 Under Missouri law, “[a] breach of contract action includes the following essential elements:  
25 (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance

1 pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered  
2 by the plaintiff.” *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010).

3 The parties do not dispute the existence of the Agreement. Moreover, the parties do not  
4 dispute that Plaintiff performed pursuant to the Agreement, which provides that IPFS “has  
5 engaged or proposes to engage Employee to perform certain services for Employer and  
6 Employer wishes to maintain secret certain information about Employer’s business and to  
7 preserve relationships with persons with whom the Employer does business.” (See Agreement,  
8 ECF No. 44-3).

9 Moreover, in her Supplement to Objections and Responses to Plaintiff’s First  
10 Interrogatories to Lorraine Carrillo, Defendant admitted to having communicated in some  
11 manner with 34 customers identified on the Restricted List. (See ECF No. 44-7). Of the 34  
12 customers identified, 33 customers are included in the 98 restricted customers under the  
13 modified Agreement. Furthermore, in her deposition, Defendant identified 13 customers that  
14 she has procured business with during her employment with PAC. (Dep. Tr. of Lorraine  
15 Carrillo 31:10–32:4, ECF No. 44-2). Each of the 13 customers are included in the 98 restricted  
16 customers under the modified Agreement. Defendant has not set forth any evidence creating a  
17 genuine issue of material fact as to whether her sales to these customers breached the terms of  
18 the Agreement as modified by the Court. Accordingly, the Court finds that the record evidence  
19 conclusively establishes Defendant’s breach of the Agreement as modified by the Court.  
20 However, although the Court grants Plaintiff summary judgment as to Defendant’s liability on  
21 its breach of contract claim, the damages issue will proceed to trial.

22 **C. Injunctive Relief**

23 Plaintiff requests that, upon granting its Motion for Partial Summary Judgment, the  
24 Court immediately issue an injunction preventing Defendant from soliciting or accepting sales  
25 from the 98 restricted customers under the modified Agreement. (Pl.’s Mot. for Summ. J.

1 11:11–28). However, Defendant asserts that the Court should deny Plaintiff’s request for  
2 injunctive relief because Plaintiff “fails to demonstrate that its alleged injury is irreparable.”  
3 (Def.’s Response 27:20–28:3).

4 Under Missouri law, “[a]n injunction should be granted against a former employee when  
5 the covenant is lawful and the employer shows a legitimate business interest at stake, unless  
6 there is a substantial reason to relieve the former employee of its ‘voluntary obligation.’”  
7 *Paradise v. Midwest Asphalt Coatings, Inc.*, 316 S.W.3d 327, 329 (Mo. Ct. App. 2010)  
8 (quoting *Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71, 75 (Mo. 1985)). Moreover, once a  
9 court modifies a non-compete agreement to be enforceable, finds that the employer has a  
10 protectable interest in its customer contacts, and finds that the former employee has the  
11 opportunity to use those contacts, it is required to enter an injunction. *Id.*

12 Accordingly, the Court enjoins Defendant from soliciting or accepting sales from the 98  
13 restricted customers under the modified Agreement until the obligations under the modified  
14 Agreement expire on July 23, 2015.

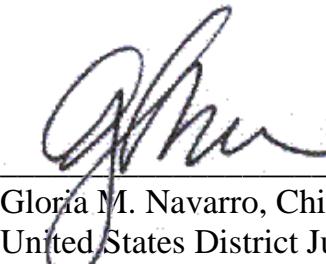
15 **IV. CONCLUSION**

16 **IT IS HEREBY ORDERED** that Defendant’s Motion for Summary Judgment (ECF  
17 No. 60) is **DENIED**.

18 **IT IS FURTHER ORDERED** that Plaintiff’s Motion for Partial Summary Judgment  
19 (ECF No. 44) is **GRANTED**. Accordingly, the Court modifies the Agreement to prevent  
20 Defendant for a period of 18 months from the date of Defendant’s employment termination  
21 with IPFS from soliciting or accepting sales from the 98 customers she had contact with during  
22 the last 24 months of her employment. Additionally, the Court finds that the record evidence  
23 conclusively establishes Defendant’s breach of the Agreement as modified by the Court.  
24 However, although the Court grants Plaintiff summary judgment as to Defendant’s liability on  
25 its breach of contract claim, the damages issue will proceed to trial. Furthermore, the Court

1 enjoins Defendant from soliciting or accepting sales from the 98 restricted customers under the  
2 modified Agreement until the obligations under the modified Agreement expire on July 23,  
3 2015.

4 **DATED** this 8th day of July, 2015.

5  
6   
7 Gloria M. Navarro, Chief Judge  
United States District Judge